Supreme Court, U.S.
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No. 93-6188

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

ROY HECK,
Petitioner,

v.

JAMES HUMPHREY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether a federal court may "recharacterize" a state prisoner's action under 42 U.S.C. § 1983 for money damages as a petition for habeas corpus and, on that basis, require the prisoner to exhaust state habeas corpus remedies before seeking to vindicate his constitutional rights under Section 1983.

2. Whether a federal court that requires exhaustion of a Section 1983 action for money damages on this basis should stay, rather than dismiss, the Section 1983 action pending exhaustion.

RULE 24.1 STATEMENT

Pursuant to Rule 24.1 of the Rules of this Court, petitioner hereby provides the following names of parties to this proceeding whose names do not appear in the caption:

Robert Ewbank, Attorney
Michael Krinoph, Indiana State Police Investigator

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (J.A. 65-70) is reported at 997 F.2d 355. The opinion of the United States District Court for the Southern District of Indiana (J.A. 13-14) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on July 1, 1993. The petition for a writ of certiorari was timely filed on September 29, 1993, and granted on January 14, 1994, together with petitioner's motion to proceed *in forma pauperis*. J.A. 82. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. § 2254(b) provides in full:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

Section 7 of the Civil Rights of Institutionalized Persons Act of 1980 (CRIPA), 42 U.S.C. § 1997e, provides in pertinent part:

> § 1997e. Exhaustion of remedies
>
> Applicability of administrative remedies
>
> (a)(1) Subject to the provisions of paragraph (2), in any action brought pursuant to section 1983 of this title by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes that such a requirement would be appropriate and in the interests of justice, continue such case for a period of not to exceed ninety days in order to require exhaustion of such plain, speedy and effective administrative remedies as are available.

> (2) The exhaustion of administrative remedies under paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b) of this section.

STATEMENT

This case arises at the intersection of two vitally important statutes, 42 U.S.C. § 1983 and 28 U.S.C. § 2254. Petitioner Roy Heck sought damages under Section 1983 from three Indiana officials in their individual capacities on the theory that the officials conspired to violate petitioner's constitutional rights during the investigation and preparation of the case against him. See J.A. 2-7. The district court treated the damages action as a petition for a writ of habeas corpus, and on that basis dismissed it without prejudice so that petitioner could exhaust state remedies. The court of appeals affirmed, holding that such treatment was proper under Seventh Circuit law and that the district court was correct in dismissing, rather than staying, the lawsuit.

1. Petitioner was convicted of voluntary manslaughter and is presently serving a fifteen-year prison sentence in Indiana. The Indiana Supreme Court affirmed the conviction. *Heck* v. *State*, 552 N.E.2d 446 (Ind. 1990) (reprinted at J.A. 16-28).

On December 27, 1988, petitioner, proceeding pro se, filed this suit in federal court under 42 U.S.C. §§ 1983, 1985(2), 1986 and 1988. The complaint named as defendants three persons who participated in the investigation and prosecution of his case: Dearborn County prosecutors James Humphrey and Robert Ewbank, and Michael Krinoph, an investigator with the Indiana State Police. See J.A. 2. Petitioner claimed that defendants "conspired and/or acted in concert" to subject him to "an illegal investigation" of his wife's death, "in violation

of the Fourth, and Fourteenth Amendments to the U.S. Constitution." *Id.* at 3-4. Petitioner made several factual allegations in his complaint, including that defendants (1) conducted an illegal search, (2) arbitrarily, unlawfully, and knowingly destroyed evidence "which was exculpatory in nature and could have proved [his] innocence," and (3) "directed * * * an illegal and unlawful v[oi]ce identification procedure [three] times with a potential state witness." *Id.* at 5. Petitioner sought damages to compensate him for losses due to wrongful confinement, punitive damages, declaratory relief, interest, costs, and attorneys' fees. *Id.* at 7. He did *not* include a claim for injunctive or equitable relief or otherwise seek invalidation of his conviction or release from prison.

3. The district court dismissed the complaint. The gravamen of petitioner's Section 1983 claim, the court explained, was that defendants had "acted improperly in an investigation culminating in his being charged." J.A. 13. Because "the issue he raises directly implicate[s] the legality of his confinement," reasoned the court, the "exclusive means by which he may do this in federal court is through an action for habeas corpus relief, which in turn may be brought only after available state remedies have been exhausted." *Id.* at 13-14. See also *id.* at 14 (stating that "a decision on the merits of the claim presented would be tantamount to determining the legality of a plaintiff's confinement").[1]

[1] Petitioner also sought but was denied habeas relief in federal court. On June 19, 1990, more than a year after the district court dismissed his civil rights claims, he filed a petition for relief under 28 U.S.C. § 2254, raising five constitutional claims: (1) insufficient evidence to support a conviction for voluntary manslaughter; (2) use of a suggestive voice identification procedure; (3) ineffective assistance of counsel; (4) use of illegally obtained wiretap evidence; and (5) deprivation of a fair trial due to use of hearsay testimony. J.A. 29-37. On January 7, 1991, the district court dismissed the petition without prejudice because petitioner had failed to exhaust his claim that he received ineffective assistance of counsel. *Id.* at 38-39. On January 22, 1991, petitioner filed a second federal habeas petition that was identical but for the omission of the ineffectiveness claim. *Id.* at 41-48. The district court found that the remaining claims had been exhausted on petitioner's direct appeal, and went on to deny relief on the merits. *Id.* at 49-59. The Seventh Circuit affirmed. *Id.* at 61-63.

4. The Seventh Circuit affirmed. J.A. 65-70. The court first agreed with the district court that, under Seventh Circuit precedent, petitioner's civil rights action for damages was properly recharacterized as a petition for habeas corpus. *Id.* at 66. Acknowledging that petitioner was not "explicitly requesting that his conviction be vacated," the court nevertheless explained that "regardless of the relief sought," if a state prisoner "is challenging the legality of his conviction, so that if he won his case the state would be obliged to release him even if he hadn't sought that relief, the suit is classified as an application for habeas corpus and the plaintiff must exhaust his state remedies * * *." *Ibid.* "This is such a case," the court continued, because petitioner "claims that he would not have been convicted had the defendants not violated his constitutional rights." *Ibid.*

Next, the court of appeals addressed the question whether "the suit should have been stayed rather than dismissed lest the plaintiff be prevented by the statute of limitations from refiling it after he exhausts his state remedies." J.A. 66. The court pointed out that under this Court's decision in *Owens* v. *Okure*, 488 U.S. 235 (1989), the statute of limitations applicable to petitioner's Section 1983 action is that set forth in Ind. Code § 34-1-2-2 (1986), which provides for a two-year limitations period; that the defendants' alleged misconduct occurred in 1987; that the Indiana statute of limitations "is not tolled by a plaintiff's imprisonment"; and that, accordingly, if petitioner "should later refile" his Section 1983 action "after exhausting his state remedies, he will be met by a defense of statute of limitations." J.A. 66. "In these circumstances," the court acknowledged, "sev-

eral decisions of other circuits hold that the district court should stay rather than dismiss the suit." *Ibid.*

The court of appeals specifically declined to follow these decisions, however, because a stay would "give[] inadequate weight to the policy of the statute of limitations, which is to bar stale suits." J.A. 66-67. The court went on to suggest that if petitioner were to exhaust his state collateral remedies, refile his Section 1983 action, and then encounter a statute-of-limitations defense, he might be able to avoid the time bar by invoking the doctrine of equitable tolling. *Id.* at 67. The panel acknowledged that under *Hardin* v. *Straub*, 490 U.S. 536 (1989), "state, not federal, tolling provisions apply to state statutes of limitations borrowed for section 1983 suits" (J.A. 68), and it further acknowledged that it had "not found any Indiana cases that recognize equitable tolling in so many words as a defense to a statute of limitations." J.A. 67. Nevertheless, the court of appeals suggested that if a state-law doctrine of equitable tolling were unavailable in these circumstances, a federal court would be obliged to fashion a *federal* doctrine of equitable tolling to effectuate "section 1983's 'chief goals of compensation and deterrence.'" *Id.* at 69 (quoting *Hardin*, 490 U.S. at 538-539).

Finally, the court of appeals proceeded to suggest the content of a federal doctrine of equitable tolling applicable in cases such as this:

> The inquiry will proceed in three stages. First, was Heck's initial failure to exhaust his state remedies excusable because of the subtlety of the distinction between a pure civil rights suit that does not require exhaustion and an ostensible civil rights suit that is also a de facto habeas corpus action and therefore does require exhaustion? Second, if so, did Heck proceed with due diligence to exhaust his state remedies and to file the renewed civil rights suit as soon as possible afterward? In answering both questions the district judge will of course have due regard for the handicaps under which Heck labors by virtue of being an unrepresented prisoner presumably untrained in law. If both questions are answered in the affirmative, a third question becomes relevant—whether the defendants are likely to be substantially prejudiced in their defense of Heck's suit by the long delay, of which they of course cannot be blamed, in the filing of a suit not barred by the doctrine of exhaustion of state remedies.

J.A. 69-70. The court "express[ed] no view on the proper answers to these questions in this case," explaining that "that would be premature." *Id.* at 70.[2]

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[2] Petitioner recently has filed a second Section 1983 complaint that restates the claims in this case (J.A. 73-81); he will attempt to prosecute that action if this suit is held to have been properly dismissed. In the course of granting petitioner's request for *in forma pauperis* status to proceed with that complaint, the district court stated that "even a careful reader of [the Seventh Circuit's decision in this case] would be left with the impression that Mr. Heck had *still* not exhausted his state remedies—and much less that he had sought federal *habeas* relief—at the time of that decision on July 1, 1993. Such an impression would be incorrect: Heck sought *habeas* relief and was denied relief * * *." J.A. 71 (emphasis in original). See note 1, *supra*. This statement is only partially correct. It is true that one of the claims advanced by petitioner in this Section 1983 action (the challenge to the allegedly suggestive voice identification procedure) was considered on petitioner's direct appeal and therefore is deemed exhausted. See, *e.g.*, *Castille* v. *Peoples*, 489 U.S. 346 (1989). But petitioner's claims that respondents destroyed exculpatory evidence and conducted an illegal search were not presented on direct appeal. Those claims, moreover, have not been considered by an Indiana court at any other time; petitioner never has invoked state post-conviction remedies. The court below therefore was correct (at least in part) in concluding that petitioner has not exhausted state remedies. J.A. 61-63.

SUMMARY OF ARGUMENT

A. It has long been settled that, as a general matter, plaintiffs may proceed in federal court under 42 U.S.C. § 1983 without first exhausting state remedies. To be sure, the Court has recognized an exception to this "no exhaustion" rule: a state prisoner must exhaust state remedies when his Section 1983 action could have been brought as a request for habeas corpus relief. But the Court has made quite clear that this principle comes into play only when the plaintiff is seeking "immediate release or a speedier release from * * * imprisonment" (*Preiser* v. *Rodriguez*, 411 U.S. 475, 500 (1973)); it has no application when "a state prisoner is seeking damages" because "[i]n the case of a damages claim, habeas corpus is *not* an appropriate or available federal remedy." *Id.* at 494 (emphasis in original).

The premise of the court of appeals' contrary conclusion in this case—that a victory by petitioner in his Section 1983 claim would have preclusive effect in a subsequent state or federal habeas action—is plainly incorrect. It is black letter law that a judgment against a state official litigating in his personal capacity (as are the respondents in this case) cannot be used to estop the state (or state officers acting in their official capacities) in future litigation. But it will be the state that will be the defendant in a subsequent action for post-conviction relief, and petitioner therefore will be unable to invoke issue preclusion in such litigation. In addition, the Seventh Circuit's holding that exhaustion is necessary whenever the prisoner's Section 1983 damages action somehow calls into question the legality of his confinement cannot be reconciled with this Court's decision in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974).

More general considerations of comity also provide no support for the Seventh Circuit's decision. Exhaustion is mandated in habeas proceedings because of the uniquely intrusive nature of the habeas remedy, which has the effect of nullifying a conviction (or sentence) and short-

circuiting the use of state judicial remedies. But an action for money damages—which are not available in state post-conviction proceedings—does not call into question the correctness of any state judicial determination, does not pretermit use of state judicial procedures (which will have to be invoked if the prisoner seeks release), and does not reflect negatively upon the state courts' ability to enforce constitutional principles. An exhaustion requirement therefore cannot be imposed in this case without calling into question the general Section 1983 "no exhaustion" rule. Such a requirement also would frustrate the policy that entitles Section 1983 litigants to a federal forum for the resolution of their constitutional claims, while creating enormously complex problems of judicial administration.

B. If the Court nevertheless concludes that exhaustion is required, it should at a minimum set aside the court of appeals' decision to dismiss rather than stay petitioner's Section 1983 action. That decision cannot be reconciled with this Court's holding in *Deakins* v. *Monaghan*, 484 U.S. 193, 202 (1988), that a district court has "no discretion" to dismiss rather than stay a federal claim for monetary relief pending the completion of related state proceedings. The decision below also is inconsistent with the manifest congressional intent: when Congress enacted the Civil Rights of Institutionalized Persons Act, it included a provision authorizing district courts, under certain circumstances, to order state prisoners suing under Section 1983 to exhaust state remedies and permitting those courts to "continue"—but not to dismiss—such Section 1983 actions pending exhaustion. 42 U.S.C. § 1997e (a)(1).

In addition, the court of appeals' approach raises the risk that a damages action, when refiled after exhaustion, will be barred by the statute of limitations. The court attempted to deal with this problem by suggesting that a federal equitable tolling rule could be applied. But such

an approach would create a new layer of wasteful and time-consuming litigation. It also inevitably would bar some meritorious Section 1983 actions that have been rendered stale by the dilatory processing of claims for state post-conviction relief. The Court should not countenance the use of such a rule.

ARGUMENT

In dismissing petitioner's civil rights action, the court of appeals evidently saw nothing exceptional in the imposition of the requirement that Section 1983 plaintiffs exhaust state remedies. But given the court's rather cursory treatment of the issue, it is worth pausing to consider the peculiarity of the holding below. The court dismissed petitioner's action pending the exhaustion of state remedies even though it is undisputed that the state post-conviction procedures to which he was committed *cannot* provide him with the *only* relief he is seeking, money damages. The court "classified" petitioner's action as a petition for a writ of habeas corpus even though he is *not* seeking release from prison or reduction of his sentence (the only relief available in a habeas proceeding) and did *not* name as a defendant the only person to whom a writ of habeas corpus may be directed, the prisoner's custodian. And the court took this action even though, as we explain below (and as Indiana has not denied), petitioner could *not* use a victory in his Section 1983 action to estop the state in a future lawsuit seeking release.

As this recital suggests, the decision below is insupportable. The court of appeals' holding is a radical departure from the usual rule, applied repeatedly by this Court, that precludes the use of exhaustion requirements in Section 1983 damages litigation. Yet the court did not, and could not, offer any justification for that departure: petitioner's claim does not raise doubts about the correctness of any state judicial determination, does not pretermit the necessity of using state post-conviction remedies if petitioner ultimately seeks release, and therefore cannot cause friction between the federal courts and the workings of the state judicial machinery. Indeed, in *Wolff* v. *McDonnell*, 418 U.S. 539 (1974), the Court held that prisoners could proceed without exhaustion in a damages action that in its relevant respects was identical to the one in this case; the court of appeals' conclusion cannot be affirmed unless *Wolff* is overruled. The judgment below therefore should be reversed.

The court of appeals' further holding that petitioner's action should be dismissed rather than stayed pending exhaustion is equally flawed. That decision departs from—indeed, it takes no account of—both a controlling decision of this Court and the clearest indications of congressional intent. At the same time, the court's creation of an equitable tolling rule to save some lawsuits that its approach otherwise would render time-barred is too clever by half: it attempts to advance the policy of terminating stale claims by creating a new layer of novel and burdensome litigation. This holding also should not stand.

I. A STATE PRISONER MAY NOT BE REQUIRED TO EXHAUST STATE HABEAS CORPUS REMEDIES BEFORE PURSUING A CLAIM FOR DAMAGES THAT IS COGNIZABLE UNDER 42 U.S.C. § 1983

1. *The "No Exhaustion" Rule.* The principle that ultimately is dispositive in this case has long been settled: as a general matter, plaintiffs may proceed in federal court under 42 U.S.C. § 1983 without first exhausting state remedies. This Court noted in *Patsy* v. *Board of Regents*, 457 U.S. 496, 500-501 (1982) (emphasis in original), that it "has stated *categorically* that exhaustion is *not* a prerequisite to an action under § 1983," and that conclusion was forcefully reaffirmed in *Patsy* itself. See *id.* at 516. As the *Patsy* Court explained, an exhaustion requirement is foreclosed by the intent of the Congress that enacted Section 1983 in 1871. See *id.* at 503-507.

It is also clear from *Patsy* that, except where expressly modified by Congress, this principle applies with full force to suits brought by state prisoners. In 1980, Congress, as part of the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997e, enacted a *limited* exhaustion requirement for certain Section 1983 actions brought by state prisoners. As the Court explained in *Patsy*, CRIPA's circumscribed exhaustion requirement—which has no application here[3]—demonstrates Congress's implicit conclusion "that the no-exhaustion rule should be left standing with respect to *other* § 1983 suits." 457 U.S. at 509 (emphasis added). The limited and "extraordinarily detailed exhaustion scheme embodied in § 1997e," when viewed against the backdrop of the general non-exhaustion rule, is "strong evidence" that Congress intended exhaustion to be required in Section 1983 actions brought by state prisoners *only* in circumstances covered by CRIPA. *Id.* at 507, 509-510. See *id.* at 511 ("[t]his detailed scheme is inconsistent with discretion to impose, on an ad hoc basis, a judicially developed exhaustion rule in other cases"); cf. *McCarthy* v. *Madigan*, 112 S. Ct. 1081, 1089 (1992).[4]

[3] CRIPA permits states to require exhaustion of state remedies prior to a state prisoner's initiation of a Section 1983 action in federal court, but prescribes detailed standards for any administrative remedies and permits exhaustion only if the Attorney General or the court finds the state's plan in compliance. 42 U.S.C. §§ 1997e(a), (b). Needless to say, Indiana's system of post-conviction relief does not satisfy the CRIPA standard. Compare 42 U.S.C. § 1997e(b) with Rules of Procedure for Post-Conviction Remedies, Ind. Stat. Ann. (Burns 1993). Nor, for that matter, has Indiana obtained approval of any such CRIPA procedure. The exhaustion order in this case accordingly is not authorized under CRIPA.

[4] The legislative history of § 1997e also "provides strong evidence of congressional intent" that exhaustion be prohibited except in the designated circumstances specified in the statute. *Patsy*, 457 U.S. at 507. Congress enacted CRIPA against a background understanding that exhaustion is not generally required in 1983 actions, thereby "clearly express[ing] its belief that a decision to require exhaustion for certain § 1983 actions would work a change in the law." *Id.* at 508; see also *Felder* v. *Casey*, 487 U.S. 131, 148-149 (1988). This understanding was made clear in early hearings on the legislation. See Civil Rights for Institutionalized Persons: Hearings Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Committee on the Judiciary, 95th Cong., 1st Sess. 20-21, 33 (1977) (statement of Drew S. Days III, Assistant Attorney General, Civil Rights Division, Dep't of Justice).

2. *The Limited Habeas Exception.* To be sure, the Court has recognized an exception to the "no-exhaustion" rule. Even when the terms of Section 1983 are "literal[ly] applicab[le]" to a state prisoner's claim, the Court has held that "the specific federal habeas corpus statute, explicitly and historically designed to provide the means for a state prisoner to attack the validity of his confinement, must be understood to be the exclusive remedy available in a situation * * * where it * * * clearly * * * applies." *Preiser* v. *Rodriguez*, 411 U.S. 475, 489 (1973). But the Court has been quite specific on when a prisoner must resort to habeas rather than Section 1983: it is "when a state prisoner is challenging the very fact or duration of his physical imprisonment, *and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment*, [that] his sole federal remedy is a writ of habeas corpus." *Id.* at 500 (emphasis added). See *id.* at 488 n.8 (habeas corpus is intended "to deal with * * * attacks on physical custody").

This approach follows from the rationale for the exhaustion requirement. The Court has reasoned that, when both a habeas petition and a Section 1983 action would provide the requested relief, a prisoner must first pursue habeas as the more specific cause of action—and accordingly must exhaust state remedies as required by Section 2254(b). But for this principle to come into play, the habeas corpus remedy necessarily must, in *Preiser*'s words, "clearly * * * appl[y]." And the habeas remedy

clearly does *not* apply when the prisoner is seeking something other than release (or the shortening of his sentence).

As the Court has declared repeatedly, "the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and * * * *the traditional function of the writ is to secure release from illegal custody.*" *Preiser*, 411 U.S. at 484 (emphasis added). It is "the unique purpose of habeas corpus[] to release the applicant for the writ from unlawful confinement." *Allen* v. *McCurry*, 449 U.S. 90, 98 n.12 (1980). Habeas accordingly

> lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him. Indeed, it has no other power; it cannot revise the state court judgment; it can act *only on the body of the petitioner.*

Fay v. *Noia*, 372 U.S. 391, 430-431 (1963) (emphasis added).[5] As a consequence, habeas is an appropriate

[5] The common law history of the writ of habeas corpus, which guides "the appropriate use of the writ in the federal courts" (*McNally* v. *Hill*, 293 U.S. 131, 136 (1934)), confirms that the role of habeas as a vehicle for attacking the legality of a criminal judgment cannot be understood except in conjunction with the traditional *purpose* of such an attack—an effort by a person in custody to secure immediate or speedier release. The modern writ developed from the English common law writ of *habeas corpus ad subjiciendum*, "the writ used to 'inquir[e] into illegal detention with a view to *an order releasing the petitioner.*'" *Preiser*, 411 U.S. at 484 (emphasis added) (quoting *Fay*, 372 U.S. at 399 n.5 (1963)). "By the time the American Colonies achieved independence, the use of habeas corpus to secure release from unlawful physical confinement, whether judicially imposed or not, was * * * an integral part of our common-law heritage." *Preiser*, 411 U.S. at 485. The First Judiciary Act explicitly granted to the federal courts the power to inquire into the cause of commitment, see Act of Sept. 24, 1789, ch. 20, § 14, 1 Stat. 81-82, and the Court construed this power in a manner consistent with the common-law purpose of the writ. See *Ex Parte Royall*, 117 U.S. 241, 248 (1886) ("it was the purpose of Congress to invest the courts of the Union * * * with power upon writ of habeas corpus, to *restore to liberty* any person * * * who is held in custody, by whatever authority, in violation of the Constitution or any law or treaty of the United States") (emphasis added); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866); *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1873). The conception of habeas corpus as providing a vehicle for overturning a criminal judgment did not change when Congress extended the writ to state prisoners, Act of Feb. 5, 1867, ch. 28, 14 Stat. 385-386, or when Congress codified habeas corpus in its modern form. See Act of June 25, 1948, ch. 646, 62 Stat. 869; Pub. L. No. 89-711, 80 Stat. 1104 (1966).

remedy, and the exhaustion requirement recognized in *Preiser* accordingly may come into play, only when the prisoner is seeking "either immediate release from * * * confinement or the shortening of its duration." *Preiser*, 411 U.S. at 489. See *Gerstein* v. *Pugh*, 420 U.S. 103, 107 n.6 (1975) (exhaustion not required when "release was neither asked nor ordered").

Conversely, it follows, as the Court also has explained repeatedly, that "habeas corpus is not an appropriate or available remedy for damages claims." *Wolff* v. *McDonnell*, 418 U.S. 539, 554 (1974). See *Allen*, 449 U.S. at 104 (the purpose of habeas "is not to redress civil injury, but to release the applicant from unlawful physical confinement"). The Court thus expressly concluded in *Preiser* that

> [i]f a state prisoner is seeking damages, he is attacking something other than the fact or length of confinement, and he is seeking something other than immediate or more speedy release—the traditional purpose of habeas corpus. In the case of a damages claim, habeas corpus is *not* an appropriate or available federal remedy. Accordingly, * * * a damages action by a state prisoner could be brought under the Civil Rights Act in federal court without any requirement of prior exhaustion of state remedies.

411 U.S. at 494 (emphasis in original). See *Mack* v. *Varelas*, 835 F.2d 995, 998 (2d Cir. 1987) ("a civil

rights action for damages, insofar as it does not also seek to void or shorten the term of imprisonment, is not a challenge that should be made by means of a habeas petition").

It could hardly be otherwise. Money damages are not available in a federal habeas action. See generally *Medley, Petitioner*, 134 U.S. 160, 173 (1889) ("[U]nder the writ of habeas corpus we cannot do anything else than discharge the prisoner from the wrongful confinement * * *."). Nor, for that matter, could they have been awarded to petitioner under the Indiana post-conviction remedies that he was directed to exhaust by the court of appeals.[6] In such circumstances, this is not a case in which the habeas remedy "clearly applies"—or, indeed, in which it applies at all. General principles of futility therefore dictate that Indiana's inadequate post-conviction remedies "need not be exhausted." *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561, 587 (1989). See also *Honig* v. *Doe*, 484 U.S. 305, 327 (1985); *McNeese* v. *Board of Educ.*, 373 U.S. 668, 674-675 (1963); *Humana of South Carolina, Inc.* v. *Califano*, 590 F.2d 1070, 1081 (D.C. Cir. 1978). In fact, it takes only a

[6] Indiana law provides three post-conviction remedies: the writ of habeas corpus, see Ind. Code § 34-1-57 (Burns 1986); post-conviction relief, see Rule 1 of the Rules of Procedure for Post-Conviction Remedies, Ind. Code Ann. (Burns 1993) (PCR Rule 1); and a motion for a new trial, see Rule 60(B), Indiana Rules of Trial Procedure (Burns 1993). None of these remedies provides for an award of damages such as petitioner seeks. See Ind. Code § 34-1-57-1; *Pruitt* v. *Joiner*, 395 N.E.2d 276 (Ind. Ct. App. 1979) (habeas corpus lies solely to inquire into the cause of detention, and remedies are injunctive in nature); PCR Rule 1 § 6 (if court finds in favor of petitioner, it "shall enter an appropriate order with respect to the conviction or sentence in the former proceedings," including ordering discharge or retrial); Rule 60(B) (authorizing court to relieve a party from judgment). See also *Burgos* v. *Hopkins*, No. 93-2006, 1994 U.S. App. LEXIS 1391, slip op. at 11-14 (2d Cir. Jan. 26, 1994) (damages are not available in New York state habeas proceedings).

moment's reflection to realize that a habeas proceeding and a damages action are entirely different animals: petitioner's Section 1983 claim would not be mooted if he were to prevail in a state post-conviction proceeding. See *Mack*, 835 F.2d at 998.

These principles should dispose of this case. In *Preiser*'s words, petitioner has not sought "a determination that he is entitled to immediate release or a speedier release from imprisonment." 411 U.S. at 500. Instead, his suit asks only for damages, for which "habeas corpus is *not* an appropriate or available federal remedy." *Id.* at 494. The rule of *Preiser* therefore does not apply; instead, the usual "no exhaustion" approach articulated in *Patsy* should be controlling.

3. *A Victory for Petitioner in his Section 1983 Suit Would Not Have Preclusive Effect in a Subsequent Action for Post-Conviction Relief.* a. In nevertheless dismissing petitioner's Section 1983 action and requiring the exhaustion of state remedies, the court below reasoned that

> [i]f, regardless of the relief sought, the plaintiff is challenging the legality of his conviction, *so that if he won his case the state would be obliged to release him even if he hadn't sought that relief*, the suit is classified as an application for habeas corpus and the plaintiff must exhaust his state remedies.

J.A. 66 (emphasis added). The court found this to be such a case because petitioner, "while not explicitly requesting that his conviction be vacated, claims that he would not have been convicted had the defendants not violated his constitutional rights." *Ibid.* The court's concern appears to be that, if petitioner prevails in his Section 1983 action, principles of issue preclusion would estop the state from defending his conviction in a future federal habeas (or state post-conviction) proceeding; he therefore would have effectively circumvented the exhaustion requirement of Section 2254(b). We recognize that several other courts of appeals have used the same reason-

ing in requiring exhaustion of Section 1983 claims for money damages. See, *e.g.*, *Offet* v. *Solem*, 823 F.2d 1256, 1258 (8th Cir. 1987); *Hamlin* v. *Warren*, 664 F.2d 29, 30 (4th Cir. 1981), cert. denied, 455 U.S. 911 (1982).

The premise of this approach, however—that a judgment against individual state officers in a Section 1983 action for money damages would have preclusive effect in a subsequent proceeding against the state—is demonstrably incorrect. It is black letter law that a "judgment against an official who has litigated in his personal capacity is not binding on his government" (18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4458 at 508-509 (1981)); "a judgment rendered in one suit has no conclusive force in the other, if the person is a party to one suit solely as an individual, and is a party to the other solely in his capacity as a * * * public official." 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.411[3.-1], at 229-234 (1993); *id.* ¶ 0.411[4], at 242-243. See *Young* v. *Kenny*, 907 F.2d 875, 876 (9th Cir. 1990) (Kozinski, J.), cert. denied, 498 U.S. 1126 (1991).

That is the case here. Petitioner's Section 1983 action may proceed only against officers in their *individual* capacities; he may not sue either the state or persons acting in their official capacities for money damages. Because "neither a State nor its officials acting in their official capacities are 'persons' under § 1983," they may not be named as defendants under that statute. *Will* v. *Michigan Dep't of Police*, 491 U.S. 58, 71 (1989). What is more, the Eleventh Amendment provides an independent obstacle to a prisoner's federal court damages action against either the state or state officials acting in their official capacities. See *Quern* v. *Jordan*, 440 U.S. 332 (1979). As a consequence, neither petitioner nor any other prisoner bringing suit under Section 1983 in federal court can obtain a judgment for money damages against the state or state officials acting in their official capacities.

A proceeding for federal habeas or state post-conviction relief, on the other hand, is pursued against the state itself. Indiana law makes this clear: a petitioner for post-conviction relief must pursue his remedies against the State of Indiana. See Rule 1, §§ 4(a), 9(d), 12(c), 12(f), Rules of Procedure for Post-Conviction Remedies, Ind. Stat. Ann. (Burns 1993); Indiana Form For Successive Post-Conviction Relief Rule 1 Petitions.[7] Because issuance of the writ would require release of the prisoner from the state's custody, habeas corpus necessarily is an action against the state.

In these circumstances, it is plain why principles of issue preclusion are inapplicable. The law is settled that collateral estoppel may be asserted only against a party that "litigated and lost in an earlier action." *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 329 (1979); *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation*, 402 U.S. 313, 329 (1971); *Restatement (Second) of Judgments* § 27 (1982).[8] This limitation applies equally to "defensive" and "offensive" uses of estoppel. Thus, the offensive use of collateral estoppel endorsed by the Court in *Parklane Hosiery* could be invoked by petitioner (or any other plaintiff similarly situated) in a subsequent action only against the parties who are defendants in the present action. See *Blonder-Tongue*, 402 U.S. at 329.

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[7] Federal practice, and practice in some states, requires that the habeas petitioner formally proceed against "the person having custody of the person detained." 28 U.S.C. § 2243; see, *e.g.*, Tex. Code Crim. Proc. art. § 11.02 (1977) (writ is "addressed to a person having another under restraint"). But regardless of whether the named defendant is the state (as in Indiana) or a warden, a writ of habeas corpus is directed toward persons acting in their official capacities as the State's custodian of the prisoner.

[8] The preclusive effect of a federal court judgment is governed by federal law. *Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353, 361-362 (1984); *Stoll* v. *Gottlieb*, 305 U.S. 165, 172 (1938); 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4468 (1981).

But a state (and its officers sued in their official capacities) on the one hand, and officers sued in their individual capacities on the other, are considered different parties: "A victory in a personal-capacity action is a victory against the individual defendant, rather than against the entity that employs him. Indeed, unless a distinct cause of action is asserted against the entity itself, the entity is not even a party to a personal-capacity lawsuit and has no opportunity to present a defense." *Kentucky* v. *Graham*, 473 U.S. 159, 167-168 (1985). A party to be precluded in the second action must, then, have appeared in the same capacity in the first suit. See *Restatement (Second) of Judgments* § 36 (1982); *Freeman* v. *Lester Coggins Trucking, Inc.*, 771 F.2d 860, 863 (5th Cir. 1985); 18 *Federal Practice & Procedure, supra*, § 4449, at 414; 1B *Moore's Federal Practice, supra*, ¶ 0.411[3].[9]

The court below therefore was simply wrong in its assumption that the state will be "obliged to release him" if petitioner prevails in his Section 1983 action; there is no risk that he will be able to circumvent the habeas exhaustion rule of Section 2254(b) through the manipulation of issue-preclusion rules. To the contrary, a victory by petitioner in his Section 1983 action would have *no* legal consequences for the state. Indeed, we note that Indiana's brief in opposition to the petition for certiorari in this case pointedly did not suggest that the state may be estopped by judgments obtained against individual state officers. As a consequence, that petitioner's Section 1983 claim somehow calls into question "the legality of his conviction" (J.A. 66) is beside the point.

b. In fact, the Court *already* has resolved this issue in petitioner's favor. In *Wolff* v. *McDonnell*, *supra*, a group of state prisoners brought a Section 1983 action

[9] Thus, a judgment in an official-capacity suit imposes liability on the governmental entity alone. *Brandon* v. *Holt*, 469 U.S. 464, 471-473 (1985).

contending (among other things) that prison disciplinary procedures "which might result in the taking of good time violated the Due Process Clause of the Fourteenth Amendment." 418 U.S. at 553. The prisoners sought both injunctive relief in the form of restoration of the unconstitutionally taken good time and "damages for the deprivation of civil rights resulting from the use of the allegedly unconstitutional procedures." *Ibid.* (footnote omitted).

In discussing the prisoners' constitutional claim, the Court explained that "[a]t the threshold is the issue whether under *Preiser* * * * the procedures for depriving prisoners of good-time credits may be considered in a civil rights suit brought under 42 U.S.C. § 1983." 418 U.S. at 554. *Preiser*, the Court continued, had held "that because the state prisoners were challenging the very fact or duration of their confinement and were seeking a speedier release, their sole federal remedy was by writ of habeas corpus, with the concomitant requirement of exhausting state remedies." *Ibid.* (citation omitted). But the Court explained that *Preiser*

> was careful to point out that habeas corpus is not an appropriate or available remedy for damages claims, which, if not frivolous and of sufficient substance to invoke the jurisdiction of the federal court, could be pressed under § 1983 along with suits challenging the conditions of confinement rather than the fact or length of custody.
>
> The complaint in this case sought restoration of good-time credits, and the Court of Appeals correctly held this relief foreclosed under *Preiser*. But the complaint also sought damages; and *Preiser* expressly contemplated that claims properly brought under § 1983 could go forward while actual restoration of good-time credits is sought in state proceedings. *Respondent's damages claim was therefore properly before the District Court and required determination of the validity of the procedures employed*

> *for imposing sanctions, including loss of good time,* for flagrant or serious misconduct. Such a declaratory judgment as a predicate to a damages award would not be barred by *Preiser* * * *.

Id. at 554-555 (footnote and citations omitted; emphasis added).

The court of appeals' conclusion that exhaustion must be required whenever a Section 1983 suit "challeng[es] the legality" of a prisoner's confinement cannot be reconciled with *Wolff*.[10] There, the Court—without dissent on the point—held that exhaustion was not required before prisoners proceeded with a Section 1983 action that challenged the constitutionality of the withdrawal of good time. To prevail in their damages action, the prisoners would have to demonstrate that the withdrawal of their good time was unconstitutional. It is immaterial that the prisoners' challenge in *Wolff* called into question the length of their confinement while petitioner's suit here is said to challenge the legality of his conviction; the Court

[10] *Preiser* pointed strongly in the same direction. As support for its conclusion that "a damages action by a state prisoner could be brought under the Civil Rights Act in federal court without any requirement of prior exhaustion of state remedies," the Court cited *Ray* v. *Fritz*, 468 F.2d 586 (2d Cir. 1972). 411 U.S. at 494. In *Ray*, a state prisoner also argued that he had been unconstitutionally deprived of good time credit. The court (Friendly, C.J., and Lumbard and Feinberg, JJ., writing per curiam), observed that "[o]ddly enough, although [the prisoner] was allegedly deprived of a substantial good time allowance, his complaint seeks only damages." 468 F.2d at 587. And although the court recognized the possibility "that applications by state prisoners seeking a change in the length or conditions of confinement should be regarded as petitions for habeas corpus no matter what they [are] called," the court concluded that "that view would not affect a prisoner's suit under 42 U.S.C. § 1983 seeking only damages." *Ibid.* In addition, the panel found exhaustion inappropriate when state administrative and judicial remedies would not provide the prisoner money damages. *Ibid.* As in *Wolff*, it was not material to the court that the damages action called into question the legality of the length of the Section 1983 plaintiff's sentence.

expressly held in *Preiser* that the two types of actions are indistinguishable for habeas purposes, explaining that a challenge to the duration of confinement "is just as close to the core of habeas corpus as an attack on the prisoner's conviction, for it * * * seeks either immediate release from * * * confinement or the shortening of its duration." 411 U.S. at 489. *Wolff* therefore is dispositive here.[11]

4. *Principles of Comity do Not Require Exhaustion.* We are aware of only one court of appeals that has required exhaustion prior to commencement of a damages action even while expressly recognizing the invalidity of the collateral estoppel rationale relied upon below. In *Young* v. *Kenny, supra,* the Ninth Circuit, although acknowledging that issue preclusion would not apply in a state or federal habeas proceeding that follows a Section 1983 damages claim, nevertheless suggested that exhaustion of state remedies is required by more general comity concerns. The court reasoned that

> a ruling [calling into question the constitutionality of the prisoner's confinement] would not bar a state from relitigating the issue in a subsequent state habeas proceeding because 'neither a State nor its officials acting in their official capacity are "persons" under § 1983' when the relief requested is damages. *Will,* [491 U.S. at 64]. Nevertheless, should a fed-

[11] Petitioner's position also draws strong support from *Gerstein* v. *Pugh, supra.* There, pre-trial detainees claimed that their detention without a judicial probable cause determination violated the Fourth Amendment. Although this claim obviously called into question the validity of their continued confinement (since it turned on their contention that they had been detained in disregard of constitutionally required procedures), they "did not ask for release from state custody, even as an alternative remedy." 420 U.S. at 107 n.6. Instead, "[t]hey asked only that the state authorities be ordered to give them a probable cause determination." *Ibid.* Citing *Preiser* and *Wolff*, the Court held (unanimously on the point) that "[b]ecause release was neither asked nor ordered, the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy." *Ibid.*

> eral court find a term of imprisonment unlawful without first giving the state court system an opportunity to correct its own constitutional errors, it may result in 'unnecessary friction between the federal and state court systems.' *Preiser*, 411 U.S. at 490. Were the state court then to uphold the sentence, the prisoner would be entitled to bring federal habeas, perhaps in the same district court that had earlier ruled that the sentence was unlawful. The purpose of the exhaustion requirement—to give state courts the first opportunity to rule on the claims of state prisoners—would accordingly be frustrated.

907 F.2d at 876 (parallel citation omitted).

The Ninth Circuit's assertion, however, is a statement of conclusions rather than an analysis or an explanation. It doubtless is true that it is the "purpose of the exhaustion requirement"—*when that requirement is applicable*—"to give state courts the first opportunity to rule on the claims of state prisoners." But it is perfectly clear that many claims of state prisoners (certainly all claims in which the validity of the conviction is not called into question) need not be exhausted; that is, after all, the point of the generally applicable "no exhaustion" rule endorsed in *Patsy*. The real question, which the Ninth Circuit entirely begged, is whether a case like *Young* (and like this one) involves such a claim.[12]

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[12] It may be that the Ninth Circuit's analysis is so unsatisfactory because the court initially predicated its decision entirely on the discredited collateral estoppel argument. In an initial opinion, the court opined that exhaustion was necessary because "[i]f habeas were not the exclusive federal method for challenging the length of a state prison sentence, the exhaustion requirement could be easily circumvented: A prevailing section 1983 plaintiff would obtain a federal court's ruling that his sentence is too long, a judgment that would preclude relitigation of the issue in a subsequent state habeas proceeding." *Young* v. *Kenny*, 887 F.2d 237, 238 (9th Cir. 1989). This opinion was modified when the court was advised, in a petition for rehearing, that the state could not be collaterally estopped in future habeas proceedings. The removal of the central prop for its holding, however, did not lead the court to change its conclusion.

In fact, it is manifest that, if issue preclusion against the state would not follow from the decision of a Section 1983 damages action, the more intangible and inarticulable comity concerns invoked in *Young* do not justify the imposition of an exhaustion requirement. Exhaustion is mandated in habeas proceedings because of the uniquely intrusive nature of the habeas remedy. The grant of a habeas petition (or of an injunction awarding habeas-type relief) has the effect of nullifying a conviction (or a sentence), and of short-circuiting use of state judicial remedies; after all, a prisoner released by order of a federal court will have no need to seek relief from the state. As the Court has put it, the habeas remedy empowers "even a single federal judge [to] overturn the judgment of the highest court of a State insofar as it deals with the application of the United States Constitution or laws to the facts in question." *Sumner* v. *Mata*, 449 U.S. 539, 543-544 (1981). See also *In re Frederich*, 149 U.S. 70, 76 (1893) ("a *habeas corpus* proceeding is a collateral attack of a civil nature to impeach the validity of a judgment or sentence of another court in a criminal proceeding").

As a consequence, a habeas proceeding may be a source of unparalleled "friction between the federal and state court systems" (*Preiser*, 411 U.S. at 490), for "it would be unseemly in our dual system of government for the federal courts to *upset a state-court conviction* without affording to the state courts the opportunity to correct a constitutional violation." *Duckworth* v. *Serrano*, 454 U.S. 1, 4 (1981) (emphasis added). See *Fay*, 372 U.S. at 419-420. It is against this background that "[t]he exhaustion doctrine seeks to afford the state courts a meaningful opportunity to consider allegations of legal error without interference from the federal judiciary."

Vasquez v. *Hillery*, 474 U.S. 254, 257 (1986). See *Rose* v. *Lundy*, 455 U.S. 509, 518 (1982) ("[t]he exhaustion doctrine is principally designed to protect the state courts' role in the enforcement of federal law and prevent disruption of state judicial proceedings").[13]

But that rationale for exhaustion simply has no application when the plaintiff seeks only damages as a remedy. An action for monetary relief that challenges the legality of a state officer's conduct does not call into question the correctness of any state judicial determination. It does not pretermit use of state judicial procedures, since a prisoner who seeks release still will have to pursue state post-conviction remedies—and it will remain open to the state court to consider the merits of the petitioner's claim. And a federal damages action does not "reflect[] negatively upon the state courts' ability to enforce constitutional principles" (*Juidice*, 430 U.S. at 336 (citations and internal quotation marks omitted)) since state post-conviction remedies do not provide for damages.

None of these points should be controversial. To the contrary, as we explain above (at 11-12), it has long been settled law that Section 1983 plaintiffs—including state prisoners—need not exhaust state remedies before

[13] Similar concerns underlie the absention rule articulated in *Younger* v. *Harris*, 401 U.S. 37 (1971), upon which the *Preiser* Court relied. See 411 U.S. at 491. The *Younger* doctrine comes into play when federal courts are called upon to enjoin or otherwise interfere with certain ongoing state judicial proceedings—an exercise of federal authority that, like the grant of a habeas petition, may carry the suggestion that state processes are in some way defective. See *Juidice* v. *Vail*, 430 U.S. 327, 336 (1977). See generally *Middlesex County Ethics Comm'n* v. *Garden State Bar Ass'n*, 457 U.S. 423, 431 (1982); *Moore* v. *Sims*, 442 U.S. 415, 430-431 (1979). The Court indicated in *Preiser* that the same policies are implicated when prison administration (in particular, the award of good time) is challenged (see 411 U.S. at 492-493); an award of good-time credit by a federal court would interfere with prison administration and pretermit recourse to state administrative and judicial procedures.

commencing Section 1983 damages actions against state officials. See, *e.g.*, *Preiser*, 411 U.S. at 498-499; *Wilwording* v. *Swenson*, 404 U.S. 249 (1971). Indeed, Section 1983 routinely is used, as in this case, to challenge assertedly unconstitutional activities of law enforcement officers. See, *e.g.*, *Malley* v. *Briggs*, 475 U.S. 335 (1986). The only distinction between this case and run-of-the-mill prisoner Section 1983 litigation is that petitioner's claim involves the events that led to his conviction. But that is a distinction without a difference so long as petitioner, to obtain release, will have to seek a remedy from a state court that remains free to deny relief if it finds that petitioner's claim is without merit. An exhaustion requirement therefore cannot be imposed in this case without calling into question the general Section 1983 "no exhaustion" approach and "mak[ing] a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States." *New Orleans Public Service, Inc. ("NOPSI")* v. *Council of the City of New Orleans*, 491 U.S. 350, 368 (1989).[14]

Even if there were any ambiguity on this point, the policies underlying Section 1983 would militate strongly against application of an exhaustion rule. It is a commonplace that "[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights—to protect the people from unconstitutional action under color of state

[14] The Court made clear in *NOPSI* that, as a general matter, "there is no doctrine that the availability or even the pendency of state judicial proceedings excludes the federal courts." 491 U.S. at 373. See generally *McCarthy* v. *Madigan*, 112 S. Ct. 1081, 1087 (1992) ("federal courts are vested with a 'virtually unflagging obligation' to exercise jurisdiction given them") (quoting *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800, 817-818 (1976)); *Cohens* v. *Virginia*, 19 U.S. (6 Wheat) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

law, 'whether that action be executive, legislative, or judicial.'" *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972) (quoting *Ex Parte Virginia*, 100 U.S. 339, 346 (1880)). Indeed, the Court in *Patsy* recognized the "no exhaustion" rule because it found that Congress "intended [to provide] * * * individuals who * * * had suffered[] the deprivation of constitutional rights * * * immediate access to the federal courts" (457 U.S. at 504 (citation omitted)); believed that state factfinding processes might be flawed and "federal courts would be less susceptible to local prejudice" (*id.* at 506); and understood that Congress had permitted the plaintiff "to choose the forum in which to seek relief." *Ibid.* See generally, *e.g.*, *Wyatt* v. *Cole*, 112 S. Ct. 1827, 1830 (1992).

Requiring plaintiffs like petitioner to exhaust state remedies will frustrate these policies in the most profound way. That is so not only because an exhaustion requirement will force plaintiffs to seek relief from the state *first*, but also because it may preclude them from *ever* obtaining a federal forum. While a victory for petitioner in his Section 1983 damages action will not estop Indiana in future state or federal habeas proceedings (see pages 17-20, *supra*), a victory for the state in a post-conviction proceeding may well estop petitioner in a subsequent Section 1983 damages action. See generally *Allen*, 449 U.S. at 95-96.[15] Furthermore, the federal

[15] If petitioner pursues a state post-conviction remedy to judgment, a federal court in a subsequent Section 1983 action would apply Indiana law to determine the preclusive effect of that judgment. See *University of Tennessee* v. *Elliott*, 478 U.S. 788, 799 (1986) (federal court must apply the law of the rendering state to determine the preclusive effect of a prior state-court judgment). Indiana recognizes nonmutual collateral estoppel. See *Sullivan* v. *American Casualty Co.*, 605 N.E.2d 134, 137-139 (Ind. 1992) (abandoning mutuality requirement); see also *Hawkins* v. *Auto-Owners Mutual Ins. Co.*, 608 N.E.2d 1358 (Ind. 1993) (endorsing offensive, nonmutual use of issue preclusion). Under Indiana law, a defendant therefore may seek to prevent a plaintiff from relitigating an issue that the plaintiff "has previously litigated and lost against the defendant or another party." *Tofany* v. *NBS Imaging Systems, Inc.*, 597 N.E.2d 23, 27 (Ind. Ct. App. 1992). If petitioner loses in Indiana post-conviction proceedings on an issue intertwined with his damages claims, then the defendants here could invoke the issue-preclusive effect of that judgment against petitioner in a subsequent Section 1983 action. Because most states have endorsed nonmutual defensive collateral estoppel (see 1B *Moore's Federal Practice*, *supra*, ¶ 0.441[3.-2], at 734; *Restatement (Second) of Judgments* § 29, Reporter's Note (1982)), estoppel has the potential to affect virtually all prisoners who bring a Section 1983 action after exhaustion of state remedies. On the other hand, it is possible that if a prisoner brought and prevailed in a subsequent federal habeas action, the prior state judgment would lose its preclusive effect; the existence of inconsistent judgments arguably would mean that neither could be used as a source of estoppel. 18 *Federal Practice & Procedure*, *supra*, § 4404, at 26. Similarly, it is possible that a prisoner could lose in state post-conviction proceedings on a ground (such as harmless error) that does not address the merits of (and therefore cannot have preclusive effect on) the prisoner's constitutional claim.

claim may be precluded if a prisoner's misstep while litigating his claim in state court causes the claim to be dismissed, or if the state court invokes procedural default rules. Cf. *McCarthy*, 112 S. Ct. at 1090-1091 (possibility of forfeiting federal damages claim through procedural missteps in administrative grievance proceedings weighs against requiring exhaustion of administrative remedy).

That outcome, of course, would have to be borne if it were clearly required by the language or policy of Section 2254. But because that is not the case, application of the exhaustion requirement would serve as "a blunderbuss to shatter the attempt at litigation of constitutional claims without regard to the purposes that underlie the doctrine and that called it into existence." *Braden* v. *30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 490 (1973).

In addition, "[s]ound judicial policy points in the same direction." *Duckworth*, 454 U.S. at 4. The rule announced by the court of appeals may sound simple, but

its application could pose vexing complexities. When is a prisoner "challenging the legality of his conviction" within the meaning of the Seventh Circuit's approach? In any given case wrongful state conduct such as "an illegal search and seizure[] or wiretap" may or may not "undergird[] the validity of the criminal conviction to which it might be related." *Guerro* v. *Mulhearn*, 498 F.2d 1249, 1254 (1st Cir. 1974).[16] Before deciding whether to require exhaustion in such a case, a federal court presumably would have to determine whether a finding of illegality, if made in a state post-conviction proceeding, would require release of the prisoner—a determination that often will be difficult.

Related problems "might arise where it is claimed that a violation of federal rights occurred which constituted 'harmless error' at trial. Here a finding may be made that rights were violated without questioning the validity of the conviction." *Guerro*, 498 F.2d at 1254. In such a case the damages action presumably could proceed, which means that a close, threshold inquiry into the facts will be necessary to determine whether the asserted constitutional error was harmless. And as Judge Coffin explained for the First Circuit, "[a]s in any area of the law, marginal cases will arise, calling for the exercise of a delicate judgment." *Id.* at 1255.[17] Multi-volume treatises

[16] In *Guerro*, the First Circuit, relying both on *Preiser* and on *Younger* v. *Harris*, *supra*, held that a state prisoner could not bring a Section 1983 damages action during the pendency of the appeal from his criminal conviction. See 498 F.2d at 1253 ("a suit for money damages under section 1983 may * * * have a substantially disruptive effect upon contemporary state criminal proceedings, and may also undermine the writ of habeas corpus"). The validity of that conclusion is not at issue here. Cf. *Huffman* v. *Pursue*, 420 U.S. 592, 608 (1975) (*Younger* requires that defendant in state criminal proceeding exhaust appellate remedies before seeking federal injunctive relief).

[17] In *Guerro* itself, for example, the Section 1983 plaintiff contended that state officials had illegally wiretapped his telephone and "us[ed] evidence obtained thereby at his criminal trial." 498 F.2d at 1251. The court of appeals was forced to remand the case to the district court—presumably to permit an expansion of the "sparse" record—for a determination whether the claim "require[d] the court to consider the question of the legality of his conviction." *Id.* at 1255.

have been written about the litigation prompted by similar issues in "true" habeas cases (see J. Liebman, *Federal Habeas Corpus Practice and Procedure* (1988 & Supp. 1993)); by affirming the rule of *Wolff*, the Court would avoid the creation of a new sort of wasteful and time-consuming jurisdictional litigation in Section 1983 damages actions brought by state prisoners. Cf. *Patsy*, 457 U.S. at 513 (noting "difficult questions concerning the design and scope of an exhaustion requirement").

5. *The Language of the Habeas Statute Demonstrates the Unsuitability of an Exhaustion Requirement.* Finally, this conclusion draws powerful support from the precise terms that Congress used in codifying both the habeas procedure and the exhaustion requirement. The federal statutes governing habeas corpus define the action by reference to the nature of the relief being sought, providing that the "Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an *application for a writ of habeas corpus*." 28 U.S.C. § 2254(a) (emphasis added). See also *id.* § 2241 (defining judicial power to grant "writs of habeas corpus" and referring to applications "for a writ of habeas corpus"); *id.* § 2242 (referring to an "[a]pplication for a writ of habeas corpus"); *id.* §§ 2243, 2244, 2245, 2246, 2247, 2249, 2250 (same). A writ of habeas corpus is an order directing the removal of a restriction on liberty, and federal law mandates that such a writ, if granted, "shall be directed to the person having custody of the person detained." 28 U.S.C. § 2243. By the same token, the exhaustion requirement of Section 2254(b) provides that "[a]n application for a writ of habeas corpus * * * shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State."

It is one thing to say that an action seeking injunctive relief directed to the person having custody of the plaintiff (such as the suit in *Preiser*) amounts to an application for a writ of habeas corpus and therefore triggers the exhaustion requirement of Section 2254(b). But it is quite another matter to hold, as did the court below, that the exhaustion requirement comes into play even when the plaintiff does not seek the removal of any restriction on his personal liberty and has not named as a defendant the only person to whom a writ of habeas corpus may be directed—"the person having custody of the person detained." 28 U.S.C. § 2243. This language plainly suggests that, in codifying the exhaustion requirement, Congress was concerned only with the award by federal courts of the peculiarly intrusive habeas remedy. It will not do, in response, to suggest that a damages action somehow implicates the policies of Section 2254(b); "[t]he 'plain purpose' of legislation * * * is determined in the first instance with reference to the plain language of the statute itself." *Board of Governors* v. *Dimension Financial Corp.*, 474 U.S. 361, 373 (1986).

This understanding is confirmed by the structure of Section 2254(b). The provision contains an exception to the exhaustion requirement for situations where "there is either an absence of available state corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." See *Duckworth*, 454 U.S. at 3 (exhaustion not necessary when "there is no opportunity to obtain redress in state court or if the corrective process is so clearly deficient as to render futile any effort to obtain relief"). Since actions for money damages do not invoke "state corrective process[es]" at all, the statutory langauge suggests that the exhaustion requirement simply has no application in such proceedings.

II. IF A STATE PRISONER MUST EXHAUST STATE COLLATERAL REMEDIES BEFORE SEEKING DAMAGES UNDER SECTION 1983, THE SECTION 1983 ACTION SHOULD BE STAYED, RATHER THAN DISMISSED, PENDING EXHAUSTION

For the reasons explained above, the court of appeals was wrong in requiring petitioner to exhaust his state remedies. If the Court disagrees with our submission on that point, however, it nevertheless should set aside the Seventh Circuit's decision to dismiss rather than stay petitioner's Section 1983 action pending exhaustion. That holding is inconsistent both with decisions of this Court and with the manifest congressional intent. It will, moreover, create an *additional* layer of litigation in an already over-litigated area, preclude the assertion of meritorious constitutional claims, and frustrate the purposes of Section 1983. It should be reversed.

1. *Dismissal of Petitioner's Section 1983 Action is Inconsistent With This Court's Decisions and Congressional Intent.* At the outset, the decision below cannot be reconciled with this Court's decisions. In circumstances essentially identical to those here, the Court held in *Deakins* v. *Monaghan*, 484 U.S. 193 (1988), that staying the Section 1983 action is the proper course. In *Deakins*, the targets of a criminal investigation by state officials brought suit under Section 1983 seeking the return of records and documents seized during the investigation, compensatory and punitive damages for asserted violations of their constitutional rights, and attorneys' fees. In light of the pendency of a grand jury investigation, the district court abstained under *Younger* v. *Harris*, 401 U.S. 37 (1971), and ordered the complaint dismissed.

This Court assumed without deciding that *Younger* abstention applies to Section 1983 claims for money damages and then instructed, in language equally applicable here, that a "District Court has *no discretion* to dismiss

rather than to stay claims for monetary relief that cannot be redressed in the state proceeding." 484 U.S. at 202 (emphasis added). Endorsing as "sound" the rule "requir-[ing] a District Court to stay rather than dismiss" such claims, the Court explained that the requirement "allows a parallel state proceeding to go forward without interference from its federal sibling, while enforcing the duty of federal courts to assume jurisdiction where jurisdiction properly exists." *Id.* at 202-203 (internal quotation marks omitted). The Court specifically took note of the risk that, "unless [a district court] retain[s] jurisdiction during the pendency of the state proceeding, a plaintiff could be barred permanently from asserting his claims in the federal forum by the running of the applicable statute of limitations." 484 U.S. at 203 n.7; see also *Patsy*, 457 U.S. at 514 n.17.[18]

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[18] The Court has taken the same approach in other areas where comity concerns have required federal courts to abstain pending the completion of state proceedings. See *American Trial Lawyers Ass'n* v. *New Jersey Supreme Court*, 409 U.S. 467, 469 (1973) (per curiam) (*Pullman* abstention); *Lake Carriers Ass'n* v. *MacMullan*, 406 U.S. 498, 512-513 (1972) (same); *Zwickler* v. *Koota*, 389 U.S. 241, 244-245 (1967) (same); *Kaiser Steel Corp.* v. *W.S. Ranch Co.*, 391 U.S. 593, 594 (1968) (under so-called *Thibodaux* abstention, "[f]ederal jurisdiction will be retained in the District Court in order to insure a just disposition of this litigation should anything prevent a prompt state court determination"). The Court has reserved the question whether a stay or dismissal is the proper course when abstaining under *Colorado River Water Conservation Dist.* v. *United States*, 424 U.S. 800 (1976). See *Moses H. Cone Memorial Hosp.* v. *Mercury Construction Corp.*, 460 U.S. 1, 28 (1983). In doing so, however, the Court explained that "[w]hen a district court decides to dismiss or stay under *Colorado River*, it presumably concludes that the parallel state-court litigation will be an adequate vehicle for the complete and prompt resolution of the issues between the parties. If there is any substantial doubt as to this, it would be a serious abuse of discretion to grant the stay or dismissal at all." *Ibid.* Here, in contrast, as in *Deakins*, "[b]ecause the state criminal [or, in this case, post-conviction] proceeding can provide only equitable relief, any action for damages would necessarily be separate. * * * Piecemeal litigation of the issues involved in this case is thus inevitable." 484 U.S. at 204.

The reasoning of *Deakins* is squarely applicable here. The risk of forfeiture of legal rights through the running of the statute of limitations is the same in both contexts. And petitioner's claim for money damages, like the claim asserted by the plaintiffs in *Deakins*, cannot be entertained in the state proceedings to be exhausted. The district court here accordingly has the same "unflagging obligation" (*Deakins*, 484 U.S. at 203 (citation omitted)) to exercise jurisdiction over the plaintiff's claims as it did in *Deakins*.

In addition to disregarding the clear import of *Deakins*, the court below gave no weight to compelling evidence that a stay, rather than dismissal, is consistent with congressional intent. As explained above (see page 12 & n.4, *supra*), in enacting CRIPA in 1980 Congress included a limited exhaustion provision that permits a federal court, under certain circumstances, to require a prisoner to exhaust state remedies. 42 U.S.C. § 1997e(a)(1). Even if a court determines that exhaustion "would be appropriate and in the interests of justice," however, it is authorized by the statute only to "*continue* such case for a period of not to exceed ninety days in order to require exhaustion." *Ibid.* (emphasis added). Notably, Congress did not authorize dismissal of prisoner Section 1983 actions subject to CRIPA's limited exhaustion requirement, and indeed it limited the duration of any stay to a period of 90 days. See *McCarthy* v. *Madigan*, 112 S. Ct. 1081, 1089 (1992).[19]

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[19] In *McCarthy*, this Court held that a federal prisoner seeking only money damages in a *Bivens* action need not first exhaust administrative remedies in the federal Bureau of Prisons (BOP), because BOP remedies could not provide the only relief sought by the prisoner—damages. In rejecting the exhaustion rule urged by the United States, this Court relied in part on the fact that the government's rule authorized *dismissal* for failure to exhaust,

In fact, an overwhelming majority of the courts of appeals have recognized that dismissal of a prisoner's Section 1983 action pending exhaustion of state remedies is inappropriate because it exposes the claimant to the risk that his damages action, when later refiled, will be deemed barred by the statute of limitations.[20] As the Ninth Circuit has explained, dismissal "could be an unnecessarily harsh method of resolving the tension between section 1983 and the habeas exhaustion requirement" because exhaustion "may take years to complete" and "it is not farfetched to contemplate that a prisoner may be unable to exhaust state remedies before the limitations period expires on his section 1983 claim." *Young*, 907 F.2d at 878. It "would hardly promote the goals of the Civil Rights Act of 1871," the Ninth Circuit added, "to twice deny prisoners a federal forum for section 1983 complaints, once for being too early and again for being too late." *Ibid.*[21]

2. *The Court of Appeals' Equitable Tolling Rule Will Lead to Wasteful Litigation and the Dismissal of Meritori-*

whereas Section 1997e of CRIPA—the best evidence of Congress's intent—permitted only a stay. 112 S. Ct. at 1089. Like the government's rule of exhaustion in *McCarthy*, the Seventh Circuit's rule of automatic dismissal is contrary to Congress's intent as expressed in CRIPA.

[20] *Duncan* v. *Gunter*, No. 93-1251, 1994 U.S. App. LEXIS 1706 (10th Cir. Feb. 4, 1994); *Jewell* v. *County of Nassau*, 917 F.2d 738 (2d Cir. 1990) (per curiam); *Young* v. *Kenny*, 907 F.2d 874 (9th Cir. 1990), cert. denied, 498 U.S. 1126 (1991); *Prather* v. *Norman*, 901 F.2d 915 (11th Cir. 1990); *Feaster* v. *Miksch*, 846 F.2d 21 (6th Cir.) cert. denied, 488 U.S. 857 (1988); *Offet* v. *Solem*, 823 F.2d 1256 (8th Cir. 1987); *Harper* v. *Jeffries*, 808 F.2d 281 (3d Cir. 1986); *Hamlin* v. *Warren*, 664 F.2d 29 (4th Cir. 1981), cert. denied, 455 U.S. 911 (1982); *Richardson* v. *Fleming*, 651 F.2d 366 (5th Cir. 1981).

[21] In contrast, dismissing federal habeas petitions pending exhaustion poses no such risk because there is no statute of limitations applicable to a refiled habeas action. *Vasquez* v. *Hillery*, 474 U.S. 254 (1986); *United States* v. *Smith*, 331 U.S. 469 (1947).

ous Suits. As the court below itself recognized, its decision exposes petitioner to the risk that his damages claims will be barred by the statute of limitations. See J.A. 66. The misconduct alleged in petitioner's lawsuit occurred in 1987; this action was timely filed on December 27, 1988. The statute of limitations applicable to petitioner's Section 1983 action must be borrowed from Ind. Code § 34-1-2-2 (1986), which provides a two-year limitations period for personal injury actions. See *Owens* v. *Okure*, 488 U.S. 235 (1989); *Wilson* v. *Garcia*, 471 U.S. 261 (1985). This period is not tolled by a plaintiff's imprisonment and, accordingly, if petitioner "should later refile" his Section 1983 action "after exhausting his state remedies, he will be met by a defense of statute of limitations." J.A. 66.

Acknowledging this problem, the court of appeals concluded that the prospect of a time-bar might be dealt with by invocation of the doctrine of equitable tolling—in particular, by creation of a *federal* rule of equitable tolling.[22] As we have explained, this decision to protect

[22] The court recognized that, under *Hardin* v. *Straub*, 490 U.S. 536 (1989), "state, not federal, tolling provisions apply to state statutes of limitations borrowed for section 1983 suits." J.A. 68. See *Board of Regents* v. *Tomanio*, 446 U.S. 478, 484 (1980). The court also observed that it had "not found any Indiana cases that recognize equitable tolling in so many words as a defense to a statute of limitations." J.A. 67. The State of Indiana agreed, in its supplemental brief filed below, that equitable tolling is unavailable under Indiana law in a case such as this one.

While the court of appeals identified *Torres* v. *Parkview Foods*, 468 N.E.2d 580 (Ind. Ct. App. 1984), as a case in which an Indiana court applied what the panel described as "a form of" equitable tolling (J.A. 67-68), that decision almost certainly would not apply here. In *Torres*, the plaintiff mistakenly filed a lawsuit in federal court that was dismissed for lack of diversity. The court held that the statute of limitations was suspended at the time of the federal filing and that a subsequent state action could be initiated outside of the original limitations period. 468 N.E.2d at 583. *Torres* was based on the Indiana Journey's Account Statute, Ind. Code § 34-1-2-8 (1986 & Supp. 1994), which provides that if a plaintiff's lawsuit "fails," a new action may be brought within

the rights of federal litigants by dismissing their Section 1983 actions and creating an equitable tolling rule that might later revive the claims—rather than through the simple expedient of staying the Section 1983 action—cannot be reconciled with *Deakins*, with the federal courts' more general obligation to exercise the jurisdiction conferred by Congress, or with the manifest congressional intent expressed in CRIPA. But the Seventh Circuit's approach is insupportable even on its own terms: it will retard judicial economy, disserve the interests of litigants, and frustrate the purposes of Section 1983 by leading to the dismissal of meritorious claims.[23]

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five years. That statute, however, provides an extension only if the decision in the first action *was not on the merits*. *Vesolowski* v. *Repay*, 520 N.E. 2d 433, 435 (Ind. 1988). In *Torres*, of course, the dismissal for lack of diversity jurisdiction was not on the merits, so the second suit could proceed. But neither *Torres* nor the Journey's Account Statute speaks to the situation here, where a plaintiff whose case is dismissed must then engage in a full round of collateral litigation in another forum before he can again present his claim. There is no provision in Indiana law for extending the statute of limitations if petitioner seeks post-conviction relief in the state courts and receives a determination on the merits. The court below, however, was not troubled by this point, explaining that "should it turn out that Indiana would not apply equitable tolling principles in the circumstances of the present case, this would be of no significance if, in that event, the federal [tolling doctrine] would be applicable, and we think it would be." J.A. 68.

[23] In fact, it is doubtful that a federal court has the authority to create a federal equitable tolling rule in the circumstances of this case. On three occasions this Court has specifically declined to substitute a federal for a state tolling rule in a Section 1983 action, cautioning against "unravel[ing] state limitations rules" that apply to federal suits. *Hardin*, 490 U.S. at 539; *see id.* at 540-544; *Chardon* v. *Fumero Soto*, 462 U.S. 650, 655-662 (1983); *Board of Regents* v. *Tomanio*, 446 U.S. 478, 492 (1980). Cf. *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 466 (1975) (declining to adopt a federal tolling rule in cases arising under 42 U.S.C. § 1981). The court below nevertheless concluded that if Indiana law would not excuse petitioner from compliance with the statute of limitations, a federal tolling rule would have to

Although the court below appeared to believe otherwise, its invocation of equitable tolling cannot be dismissed as a harmless frolic and detour that simply takes an alternative route to the same result (preservation of otherwise time-barred Section 1983 claims) as would be achieved by staying the federal action. To the contrary, the approach taken by the Seventh Circuit creates a new layer of wasteful and time-consuming litigation. Resolution of disputes about whether the statute of limitations should be tolled will require the expenditure of very substantial judicial resources. Federal courts will first have to examine state tolling rules—which is far from a simple matter (see *Chardon*, 462 U.S. at 667 (Rehnquist, J., dissenting))—to determine whether state law affords the plaintiff an equitable defense to the statute of limitations. This is likely to be a particularly difficult inquiry in the context of cases such as this one, which do not have state-law analogues and hence are not likely to give rise to decisional law on point.

If state tolling rules do not preserve the federal claim, petitioner (and other plaintiffs like him) must, under the

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apply because it would be "essential to the vindication of federal rights." J.A. 68. But while this Court has recognized the possibility that state statutes of limitations and related tolling doctrines might not be used in Section 1983 litigation when their use "would defeat the goals of the federal statute" (*Hardin*, 490 U.S. at 539), the Court declined to apply that exception in *Hardin*, *Chardon*, and *Tomanio*. As the Court has explained, "a state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation." *Tomanio*, 446 U.S. at 488 (internal quotations omitted); cf. *Robertson* v. *Wegmann*, 436 U.S. 584 (1978) (applying state survivorship statute even though it precluded continuation of Section 1983 action). At least one court of appeals has held that this principle precludes the creation of a federal equitable tolling rule where a state prisoner is required to exhaust state remedies prior to proceeding with a Section 1983 damages action. *Jewell* v. *County of Nassau*, 917 F.2d 738, 739-740 (2d Cir. 1990). The court therefore ordered the Section 1983 claim stayed rather than dismissed. See *id.* at 740.

court of appeals' approach, then clear three distinct hurdles to avoid a time-bar under the federal rule. First, petitioner's "initial failure to exhaust his state remedies" must be "excusable because of the subtlety of the distinction between a pure civil rights suit that does not require exhaustion and an ostensible civil rights suit that is also a de facto habeas corpus action and therefore does require exhaustion." J.A. 69. Second, the court must determine that the plaintiff "proceed[ed] with due diligence to exhaust his state remedies and * * * file[d] the renewed civil rights suit as soon as possible afterward." *Ibid.*[24] And if the plaintiff satisfies both of these requirements, "a third question becomes relevant—whether the defendants are likely to be substantially prejudiced in their defense of [petitioner's] suit by the long delay." *Id.* at 70.

All of these inquiries will be fact- and case-specific and, necessarily, time-consuming. Indeed, the analysis mandated by the court of appeals generally will be far more complex than an examination of the merits. As this Court has noted, "[o]ur experience teaches us that the vast majority of prisoner cases are resolved on the complaint alone. Of those prisoners whose complaints survive initial dismissal, few attempt discovery and fewer still actually obtain it." *Cleavinger* v. *Saxner*, 474 U.S. 193, 208 (1985). And that is particularly likely in cases such as this one, for many prisoner claims will be precluded by an adverse determination in state post-conviction proceedings. The court's decision therefore will lead to a

[24] To the extent that the court's approach is designed to penalize a plaintiff for inexcusable dilatoriness in pursuing his claim (see J.A. 67), a district court may exercise its inherent power, following the issuance of a stay, to take such actions as may become necessary to respond to occurrences in the state court proceedings. *Harrison* v. *NAACP*, 360 U.S. 167, 178 (1959); *Romany* v. *Colegio de Abogados de Puerto Rico*, 742 F.2d 32, 44 (1st Cir. 1984); *New Jersey-Philadelphia Presbytery* v. *New Jersey State Bd. of Higher Educ.*, 654 F.2d 868, 887-888 (3d Cir. 1981).

new and uniquely burdensome round of procedural litigation in prisoner Section 1983 actions.

3. By the same token, the approach charted by the Seventh Circuit, in addition to being longer and rockier than the course of simply staying a Section 1983 action pending exhaustion, does not necessarily lead to the same destination. Under the equitable tolling rule recognized by the court of appeals, a plaintiff may be time-barred through no fault of his own because delay has prejudiced the defense—even though the plaintiff acted with diligence and his failure to exhaust was "excusable." J.A. 69. If this rule is applied strictly, it inevitably will bar some meritorious Section 1983 actions; if the rule is applied loosely, it will require a large volume of additional litigation that is to no one's benefit.

The court of appeals' sole rationale for the erection of this elaborate structure was the passing observation that the expedient of staying a Section 1983 action pending exhaustion "gives inadequate weight to the policy of the statute of limitations, which is to bar stale suits." J.A. 66-67. But the court sought to advance that policy by ignoring both sound principles of judicial economy and the paramount goals of Section 1983: deterring, and providing compensation for, violations of the Constitution. Indeed, the court's approach would reward a state with the dismissal of an action against its officers whenever the state itself made the claim "stale" through the dilatory processing of claims for post-conviction relief. This Court should not countenance the use of a rule that accomplishes so little at such substantial cost.

CONCLUSION

The judgment of the United States Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted.

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